A

PP

v.

ZAINAL ABIDIN MAIDIN & ANOR

B

HIGH COURT MALAYA, SHAH ALAM
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 41LB-202-08-2013]
12 AUGUST 2014

C ***CRIMINAL LAW:*** *Penal Code - Section 427 - Charge for committing mischief - Whether prosecution established prima facie case - Whether evidence of prosecution witnesses' credible*

CRIMINAL PROCEDURE: *Appeal - Acquittal at close of prosecution*
D *case - Whether analysis and findings of Magistrate correct - Whether prosecution established prima facie case - Whether contradictions and inconsistencies in evidence of prosecution witnesses' prejudiced prosecution's case - Penal Code, s. 427*

EVIDENCE: *Witness - Credibility - Contradictions and inconsistencies*
E *in evidence of prosecution witnesses' - Whether evidence credible - Whether credibility of prosecution witnesses affected*

The respondents were jointly charged with committing mischief under s. 427 of the Penal Code. A Myvi car, driven by the first
F respondent, had overtaken the complainant's ('SP2') car causing the front part of SP2's car to be grazed by the Myvi. The first respondent got out of his car and in an angry manner began to hurl insults at SP2. The second respondent subsequently alighted from the Myvi and proceeded to hit the windscreen and the boot
G of SP2's vehicle. The first respondent allegedly took out a steering lock from the Myvi and proceeded in the direction of SP2. SP2, fearing the worst for himself and his wife, SP1, who was in the car, got into his car and drove away. However, the respondents tailed SP2's car and subsequently at a parking lot proceeded to
H kick and hit SP2's vehicle. At the end of the prosecution case, the Magistrate held that a *prima facie* case was not made out by the prosecution and acquitted and discharged the respondents without calling for their defence. Hence, the prosecution appealed.

I

Held (dismissing appeal; affirming Magistrate's decision):

(1) Both SP1 and SP2 were present at the scene of the incident and were eyewitnesses of what had transpired. Yet, their evidence contradicted each other on the simplest of matters. Their evidence in respect of which part of SP2's vehicle was damaged was at variance with each other. (para 25)

(2) Although there was mention as to the steering lock in SP2's police report, it was never stated therein that it was used to hit SP2's car. The oral testimony of SP1 and SP2 also failed to inspire confidence when SP1 said that it was used to hit the car although she was not sure how it happened while SP2 said she did not see it being used to hit the car. When coupled with the fact that SP2's car was not impounded, the evidence of the prosecution suffered from infirmities that could not be dismissed as mere trivialities. (paras 28 & 29)

(3) The evidence of SP1 and SP2 and the absence of a traffic police report lodged in respect of the accident when considered against the reports lodged by the respondents and further, the adjuster's report in respect of the damage caused to the vehicle of the respondents, leaned towards the conclusion that the evidence of SP1 and SP2 in totality may not be altogether credible. (para 30)

(4) Taken in isolation, the contradictions in the evidence of SP1 and SP2 of itself may not amount to much but when viewed in totality with the rest of the infirmities in the prosecution's case, they assume more significance. The infirmities directly go to the credibility of both SP1 and SP2 as prosecution witnesses. (para 46)

(5) There was no flaw in the analysis, findings and conclusion of the learned Magistrate that the very ingredients of the charge were not proved so that the prosecution had failed to make out a *prima facie* case against the respondents. The Magistrate had outlined the ingredients of the offence under s. 427 of the Penal Code and had carefully sifted through the evidence presented by the prosecution, especially the fact that there were contradictions and inconsistencies between SP1 and SP2 and reasoned that the contradictions and inconsistencies did not stand up to scrutiny in the light of the maximum evaluation test. (paras 51-53)

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***
Lim Ah Poh v. PP [1992] 1 SLR 713 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Pie Chin v. PP [1983] 1 LNS 70 HC ***(refd)***
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Penal Code, ss. 426, 427

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 27th edn, vol 2, p 2763

For the prosecution - Izalina Abdullah; DPP
For the respondent - Shahrul Nizam; Chamber of Shahrul Nizam

Reported by S Barathi

JUDGMENT

Collin Lawrence Sequerah JC:

[1] This is an appeal from the Magistrate's Court at Selayang where the respondents were jointly charged with committing mischief under s. 427 of the Penal Code. At the end of the prosecution case, the Magistrate held that a *prima facie* case was not made out by the prosecution and acquitted and discharged the respondents without calling for their defence.

The Charge

[2] The charge against the respondents in Bahasa Malaysia read as follows:

> Bahawa kamu bersama-sama pada 23/4/2012 lebih kurang jam 1830 hrs di Jalan Rawang-Batu Arang berhadapan Sekolah Kebangsaan Sinaran Budi Rawang dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan telah melakukan khianat dengan menumbuk dan menendang motokar no WLR 1526. Jenis : Anggaran kerugian lebih kurang RM1000.00 milik Mohd Khir

bin Hj Rashid KP: RF11175. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 427 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[3] A conviction under s. 427 carries a punishment of imprisonment for a term which may extend to two years, or with fine or with both.

Facts

[4] The brief facts of the case as adduced by the prosecution witnesses were as follows. On the 23 April 2014 a Myvi car driven by the first respondent bearing registration number WWE 7945 overtook the complainant's (SP2) car on the left side.

[5] As a result, the Myvi had grazed against the front part of the SP2's car. The driver of the Myvi, the first respondent, got out of his car and in an angry manner began to hurl insults at SP2. Subsequently, the second respondent also alighted from the Myvi and proceeded to hit the windscreen and the boot of SP2's motor vehicle.

[6] The first respondent then took out a steering lock from the Myvi and proceeded in the direction of SP2. SP2, fearing the worst to himself and his wife SP1, who was in the car at the time, got into his car and drove away.

[7] The respondents tailed SP2's car until the parking lot at AEON Jusco Rawang. They then alighted and proceeded to kick and hit SP2's motor vehicle.

Grounds Of Appeal

[8] In the petition of appeal filed by the public prosecutor four grounds are raised, namely:

(a) The Magistrate erred in finding that the appellant had failed to establish a '*prima facie*' case against the respondent at the end of the prosecution case when the evidence showed otherwise;

(b) The Magistrate erred in holding that the prosecution had failed to establish a '*prima facie*' case on the basis that the photographer only took photographs of exh. P1(a) to (g), pictures showing damage to the car only a day after the incident whereas such an issue was not material enough to prejudice the prosecution case;

(c) The Magistrate erred in holding that the prosecution had failed to establish a '*prima facie*' case on the basis that there were contradictions between the evidence of SP1 and SP2 in respect of the identification of the damage to the motor vehicle from the photographs taken, whereas the contradictions were not material.

(d) The Magistrate erred in taking into account issues that were not material in deciding that the prosecution had failed to establish a '*prima facie*' case.

Issues For Consideration

[9] A perusal of the grounds of appeal would clearly indicate that there are only two main issues for consideration. Firstly, did the fact that the photographs showing the damage caused to SP2's motor vehicle were only taken a day after the incident materially prejudice the prosecution case?

[10] Secondly, are the contradictions between the evidence of SP1 and SP2 in respect of the identification of the damage to the motor vehicle from the photographs taken, material?

Photographs Of Motor Vehicle Taken A Day After The Incident

[11] In the course of submission, learned counsel for the respondents raised the issue of a break in the chain of evidence. SP3, the investigating officer (IO) testified that he only requested SP4, the photographer, to take the photographs of SP2's vehicle the following day after the incident.

[12] Under cross-examination, SP4 testified that the IO had only called him on the day the photographs were taken. SP4 further testified that there were two photographers at that police station and according to the duty rooster, if one was on duty the other was not. The respondent's questioned as to why, if one photographer was unavailable that day, the other was not called.

[13] It was also put in cross-examination to SP3 that he could have taken the photographs using his handphone before calling the photographer, to which he replied that his handphone had no camera. SP3 gave no oral evidence that he had made any observation that SP2's car was indeed damaged at the time he inspected it. The respondent's learned counsel further raised the issue of causation, ie, whether or not it was the respondents who

had caused the damage to SP2's car. Taken in isolation, perhaps nothing much can be made of the mere failure to take photographs of SP2's car on the very day of the incident at the police station.

[14] However, this must be evaluated against the totality of the other evidence available, most notably, as will be considered later on, that of the contradictions between SP2 and SP3 in respect of identifying the precise location of the damage to SP2's vehicle from the photographs taken, exh. P1(a) to (g).

[15] The respondents also questioned as to why, if the photographs were not able to be taken on the day of the incident, SP2's car was not impounded until photographs were taken. Instead, SP2 was allowed to drive his vehicle home until the next day. Although it was not directly suggested that SP2 may have inflicted the damage to his car himself, it was in cross-examination put to him that it was not the respondent's that had inflicted the damage.

[16] It was further suggested to SP2 in cross-examination that the second respondents had merely tapped the bonnet of his car to get his attention in order for him to stop his car.

Contradictions Between SP1 And SP2

[17] The contradictions between SP1 and SP2 arise mainly from their identification from the photographs taken of SP2's car, exh. P1(a) to (g), in respect of the location of the damage to the car. SP1, when shown P1(g) said that she was unsure what part of SP2's car is shown because it is unclear, although this is not strictly a contradiction. SP2 says that photograph P1(g) is the dent of the front part of his car which was hit by the second respondent.

[18] In respect of photograph P1(d), SP1 testified that this shows the back door on the driver's side (right side) that was kicked by the second respondent while SP2 testified that it was the front door on the left side of the car.

[19] In respect of photograph P1(e), SP1 testified that it showed the left front door that was kicked by the second respondent whereas SP2 said this was the right front door that was kicked by the second respondent.

[20] SP1 also testified that the first respondent swung a steering lock and hit SP2's car although she was not sure how exactly it happened. SP2 on the other hand, said that he did not see the first respondent hit his car with a steering lock, although he was sure it had happened.

[21] In SP2's police report, P8, while he makes mention of the steering lock, does not state whether the steering lock was used to hit his car.

Other Issues

Police Report Lodged By The Respondents

[22] There were as a result of the incident, police reports lodged by the respondents. The first respondent made a report on 14 June 2012 and reported the incident that led to the traffic accident and he also alleged that he felt he was victimised 'teraniaya' by the complainant who was a police who had made an untrue report. The second respondent lodged two police reports on 24 April 2012 and 27 April 2012 respectively, in respect of both the accident and the alleged incident that followed and also stated that he felt "teraniaya" by SP2's police report.

[23] SP2 on the other hand, did not lodge a traffic police report. While being cross-examined SP2 stated that this was because the issue of the accident was not important to him compared to the alleged road bully case involving the damage to his car and the use of the steering lock. He also alleged that he had met with the traffic investigation officer who had told him that it was not necessary to lodge a traffic report.

Conflict Of Interest

[24] Learned counsel for the respondents also raised the issue of conflict arising from the fact that both SP2 and SP3 the IO were serving at the Gombak police station. In cross-examination, SP3 admitted that the complainant, SP2, and he both served at Ibu Pejabat Daerah, IPD Gombak and that he knew SP2 was also an IO. It was suggested to SP3 in cross-examination that the proper course of action would have been to request the public prosecutor's office to exclude him from the case. SP3 replied that he had done so but that he was informed to carry on the investigation.

Analysis Of The Issues Raised

[25] As alluded to earlier, when taken in isolation, the matters raised by the respondent's learned counsel may not amount to much. However, when considered in totality and viewed against all the circumstances of the case, the issues raised merit serious consideration. It must be remembered that both SP1 and SP2 were present at the scene of the incident and were eyewitnesses of what had transpired. Yet their evidence contradicted each other on the simplest of matters. Their evidence in respect of which part of SP2's vehicle was damaged as seen from the photographs P1(a) to (g) was at variance with each other.

[26] The learned Deputy Public Prosecutor submits that the contradictions are not material and do not prejudice the appellant's case. The prosecution submits that what is important is that the witnesses testified that it was the respondents who caused the damage to SP2's car. It matters not that they cannot identify which part of the car was damaged from the photographs shown.

[27] To further exacerbate the situation, it was pointed out by learned counsel for the respondents that the witnesses were not asked to mark on the photographs P1(a) to (g) the exact spot where the damage was caused.

[28] In respect of the steering lock, although mention of it was made in P8, SP2's police report, it was never stated therein that it was ever used to hit SP2's car. As stated earlier, the oral testimony of SP1 and SP2 in this regard also fails to inspire confidence, with SP1 saying it was used to hit the car although she was not sure how it happened while SP2 said he did not see it being used to hit the car.

[29] When coupled with the fact that SP2's car was not impounded, as no photographer was available that day, the evidence of the prosecution suffers from infirmities that cannot be dismissed as mere trivialities.

[30] The evidence of SP1 and SP2 and the absence of a traffic police report lodged in respect of the accident when considered against the reports lodged by the respondents and further the adjusters report IDD10 in respect of the damage caused to the

vehicle of the respondents leans toward the conclusion that the evidence of SP1 and SP2 in totality may not be altogether credible.

[31] Under 426 of the Penal Code the prosecution must prove the following ingredients:

(i) The accused caused the destruction of some property, or some change in such property or in the situation thereof;

(ii) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously;

(iii) That the accused did as in (i) intending or knowing that he was likely to cause loss or damage to the public or to any person;

(iv) That the causing of such damage on injury was wrongful.

See *Ratanlal and Dhirajlal's Law of Crimes* 27th edn. vol. 2 p. 2763. Section 426 provides for enhanced sentence where the loss or damage caused is more than 25 ringgit.

[32] Based on the maximum evaluation test, can the prosecution be said to have made out a *prima facie* case in respect of all the ingredients of the offence?

The Test For *Prima Facie* Case

[33] Section 180(1) of the Criminal Procedure Code (CPC) reads:

> When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

[34] This amendment came into existence *vide* the Criminal Procedure Code (Amendment) Act 1997 (Act A979). Parliament's intention in enacting this amendment was to reverse the majority of the Federal Court decision in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 AMR 329. This intention of Parliament is best expressed in the words of Gopal Sri Ram JCA (as he then was) in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89 at p. 101:

> In our judgment Parliament by the phrase "*prima facie*" case intended to reverse the majority of the Federal Court in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 AMR 329; [1997]

1 MLJ 1 and to statutorily codify the minority view in that case. The majority view in *Arulpragasan* was in the main a criticism directed at the opinion expressed by Lord Diplock in *Haw Tua Tau v. PP* [1981] 2 MLJ 49. In *Haw Tua Tau*, Lord Diplock appears to have equated trials before a judge and jury to trials before a judge sitting alone.

[35] The meaning of the phrase "*prima facie*" in its current form has been the subject of judicial pronouncement in a number of cases. In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court held:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th edn, as:
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> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[36] In *PP v. Dato Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 213; [1999] 2 AMR 2017; [199] 2 MLJ 1 it was observed:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken

A in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum B evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

[37] In the exercise of the trial court's evaluation of whether a C *prima facie* case has been made out, it was observed in *Looi Kow Chai (supra)* as follows:

In our respectful view, the correct test to be applied in determining whether a *prima facie* case has been made out under s 180 of the CPC (and this would apply to a trial under s. 173 D of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232 at p 270:

> To summarize, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* E case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are F being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.

[38] The foregoing observations in *Looi Kow Chai* then concludes: G

It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: H if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

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[39] In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 the Federal Court outlined the steps to be taken at the end of the prosecution case:

> (i) At the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
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> (ii) Ask yourself the question : If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;
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> (iii) After the defence is called, the accused elects to remain silent, then convict;
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> (iv) After defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] MLJ 263.

[40] A few principles can be culled and summarised from the authorities just cited. Taken in its totality, the prosecution evidence must be subjected to maximum evaluation. This means, *inter alia*, subjecting to scrutiny the credibility of the prosecution witnesses. As of necessity, this would mean that their evidence is not to be taken at face value and must therefore be free of any contradictions that may affect credibility. If two or more inferences arise from the evidence, the inference to be adopted is the one that favours the accused.

[41] If the accused were to be called upon to make his defence and he elects to remain silent, is the court prepared to convict him on the evidence presented. If the answer is "yes" a *prima facie* case has been successfully made out and the defence should be called. If the answer is "no" then defence should not be called.

[42] It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1. Further, in *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 Sharma J had occasion to observe:

> It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.

Summary Of The Evidence And The Findings Of This Court

[43] Does the evidence led by the prosecution withstand the rigorous scrutiny of the maximum evaluation test as propounded by the authorities referred to?

[44] The issues regarding the contradictions between the evidence of SP2 and SP7 have already been alluded to, as were the other issues raised by the respondents. They need not be repeated.

[45] The prosecution has submitted that the contradictions are not material and that what matters is not where the damage occurred but the fact that damage occurred.

[46] As alluded to earlier, taken in isolation the contradictions of itself may not amount to much but when viewed in totality with the rest of the infirmities in the prosecution case, they assume some significance. These infirmities directly go to the credibility of both SP1 and SP2 as prosecution witnesses.

[47] While it is true that not all inconsistencies, discrepancies or contradictions necessarily render the witness's entire evidence incredible, where these inconsistencies go to the root of the charge, for example whether or not it bears upon the question of whether the accused persons were involved in the crime alleged, they can no longer be disregarded as being of a trivial nature.

[48] In *Pie Bin Chin v. PP* [1983] 1 LNS 70; [1985] 1 MLJ 234 it was held that it is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

[49] This court finds this to be the case here for the reasons set out above. In respect of the principles which govern appellate interference, I can do no better than refer to the case of *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813 where it was held in respect of judicial appreciation of evidence:

> Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there has been no or insufficient judicial appreciation of the evidence.

[50] In similar vein is the case of *Lim Ah Poh v. PP* [1992] 1 SLR 713 where it was held:

> An appellate court customarily exercises great caution in evaluating factual findings and will not interfere with a trial judge's findings unless they are plainly wrong.

[51] The learned Magistrate in her grounds of judgment had outlined the ingredients of the offence under s. 427 Penal Code. She had carefully sifted through the evidence presented by the prosecution especially the fact that there were contradictions and inconsistencies between SP1 and SP2 and reasoned that these contradictions and inconsistencies do not stand up to scrutiny in the light of the maximum evaluation test.

[52] She therefore found that the very ingredients of the charge were not proved so that the prosecution had failed to make out a *prima facie* case against the respondents.

[53] This court therefore finds no flaw in the analysis, findings and conclusions of the learned Magistrate.

[54] The prosecution's appeal is accordingly dismissed and the decision of the learned Magistrate affirmed.